

It was undisputed the claimant suffered accidental injuries arising out of and in the course of his employment on October 7, 2003. The disputed issue was the nature and extent of claimant's functional disability. Claimant alleged permanent injury to his back as well as his shoulder and knee which would entitle him to compensation for a whole person

functional impairment.<sup>1</sup> Respondent alleged claimant's permanent functional impairment was limited to his shoulder and knee which would entitle him to compensation for two scheduled disabilities.

The Administrative Law Judge (ALJ) determined claimant initially injured his shoulder and knee. But the knee injury required a total knee replacement and as a consequence claimant now has a pronounced limp which caused degenerative disk disease in claimant's lumbar spine to become symptomatic. Consequently, the ALJ awarded claimant a 25 percent whole person functional impairment for permanent impairment to his left shoulder, right knee and back.

The respondent requests review of the nature and extent of claimant's functional impairment. Respondent argues the claimant has not met his burden of proof that his low back injury is related to his accident on October 7, 2003, therefore the claimant should only be entitled to two separate scheduled injuries to his left shoulder and right knee. Respondent further argues that Dr. Rawcliffe's rating and opinion is more persuasive than those of Drs. Fluter and Holt.

Claimant argues the ALJ's Award should be modified to provide for a 37 percent functional impairment based upon Dr. Fluter's rating but otherwise affirmed as to the determination claimant suffered permanent injury to his back as well as his shoulder and knee.

#### **FINDINGS OF FACT AND CONCLUSIONS OF LAW**

Having reviewed the evidentiary record filed herein, the stipulations of the parties, and having considered the parties' briefs and oral arguments, the Board makes the following findings of fact and conclusions of law:

The Board finds the ALJ's findings and conclusions are detailed, accurate and supported by the law and the facts contained in the record. It is not necessary to repeat those findings and conclusions in this Order. The Board approves those findings and conclusions and adopts them as its own.

Highly summarized, on October 7, 2003, while working as a flagman for the State of Kansas, the claimant was struck by a co-employee's vehicle. As a result of his injuries he underwent arthroscopic surgery on his right knee and arthroscopic repair of a torn rotator cuff in his left shoulder. Because of continued problems with his knee the claimant ultimately underwent total right knee replacement surgery.

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<sup>1</sup> The claimant returned to work at a higher wage than his pre-injury average gross weekly wage so he did not allege entitlement to a work disability (a permanent partial general disability greater than the functional impairment).

The primary disputed issue is whether claimant suffered permanent injury to his back as a result of the work-related accident. Dr. Fluter opined claimant suffered a 5 percent functional impairment to his lumbar spine and Dr. Rawcliffe opined claimant did not suffer any permanent impairment to his lumbar spine.

Dr. Robert Holt initially treated claimant after his accident and opined that claimant's accidental injury accelerated and aggravated claimant's degenerative disk disease in his spine. It is undisputed that claimant walks with a pronounced limp.

Dr. Rawcliffe agreed claimant appeared truthful relating his complaints and that the doctor did not suspect any symptom magnification. Dr. Rawcliffe further agreed that walking with a limp can cause back pain and he had no reason to doubt claimant's low back pain is increased by walking.

As noted by the ALJ, Drs. Fluter and Rawcliffe each examined claimant both before and after his right knee total replacement surgery. In both of Dr. Rawcliffe's reports he notes claimant has increased lumbar pain with bending, lifting, standing and walking for prolonged periods. Although the doctor agreed the accident resulted in a temporary aggravation of claimant's degenerative disk disease he did not believe the accident caused permanent symptoms. But the doctor's explanation of why subjective complaints would support his opinion of temporary aggravation but the same complaints would not support a conclusion of permanent aggravation was not persuasive. On cross-examination the doctor testified:

Q. This accident occurred on October 7th, 2003. You're seeing him in May of 2006, so at least two and a half years later.

A. Right.

Q. And he's still having back pain.

A. Yes.

Q. So he hasn't recovered from the back pain from the time of the accident.

A. Well, but it's a question of what's causing the back pain. I would have expected at some point these changes that you see on x-ray would have caused him to become symptomatic, with or without an injury.

Q. But would you agree the accident in all probability accelerated and aggravated the condition at the time?

A. Well, temporarily, yes.

Q. Well, what's temporarily in your - -

A. I don't think it's permanent.

Q. What's temporarily in your estimation? How long is temporarily?

A. Two or three months perhaps.

Q. Okay. But here's two and a half years, so they've been aggravated at least - - you'd count that permanent, wouldn't you?

A. But you're talking about subjective symptoms.

Q. I understand. But you're also talking about subjective symptoms for a temporary time, correct?

A. That's correct.

Q. There's no way pain can be evaluated or rated, is there?

A. No, absolutely not.

Q. But you would agree that these x-rays are objective findings to substantiate his subjective complaints of pain.

A. Yes. When put that way, it's true.<sup>2</sup>

The ALJ concluded claimant walks with a limp as a result of his work-related accident and that caused the previously asymptomatic degenerative disk disease in claimant's lumbar spine to become symptomatic. Consequently, the ALJ adopted Dr. Fluter's permanent functional impairment rating to claimant's lumbar spine. The ALJ stated:

In any event, Claimant had pre-existing, albeit asymptomatic, degenerative disk disease in his low back, and all of the physicians who have testified have acknowledged that Claimant has a significant limp or "altered gait." Those same physicians have opined that an altered gait can render a previously asymptomatic condition symptomatic. The question presented is whether those symptoms, once activated, remain as a permanent condition or whether they abate with time. Claimant has walked with an altered gait for almost three years. That altered gait rendered his pre-existing degenerative disk disease in his lumbar spine symptomatic. It is well established that a work-related injury or activity that aggravates, accelerates, intensifies or renders symptomatic a pre-existing condition is compensable as a workers compensation claim. **Claphan v. Great Bend Manor, 5 Kan.App.2d 47, 611 P.2d 180 (1980).**

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<sup>2</sup> Rawcliffe Depo. at 38-40.

Having been symptomatic for almost three years, it is unlikely to abate in the foreseeable future. The court deems the low back complaints to be “permanent” and thus sufficient to place the Claimant in the Lumbosacral DRE Category II of the **Guides**, for which a 5% impairment of function to the body as a whole is appropriate.

The Court adopts Dr. Rawcliffe’s ratings as to the left shoulder and right knee finding those observations more credible and consistent with the balance of Claimant’s medical records than those of Dr. Fluter. Claimant has thus suffered a 1% impairment of function to the body as a whole for his left shoulder complaints, and a 20% impairment of function to the body as a whole for the residuals of the right knee arthroplasty. Combining all of those ratings with the **Guides’** “Combined Values Chart” yields a 25% permanent partial impairment of function to the body as a whole.<sup>3</sup>

The Board agrees and affirms.

### **AWARD**

**WHEREFORE**, it is the decision of the Board that the Award of Administrative Law Judge Bruce E. Moore dated August 16, 2006, is affirmed.

### **IT IS SO ORDERED.**

Dated this \_\_\_\_\_ day of December 2006.

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BOARD MEMBER

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BOARD MEMBER

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BOARD MEMBER

c: James B. Zongker, Attorney for Claimant  
Richard L. Friedeman, Attorney for Respondent and its Insurance Carrier  
Bruce E. Moore, Administrative Law Judge

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<sup>3</sup> ALJ Award (Aug. 16, 2006) at 6-7.